JS Mechanical, Inc., *and* Sheet Metal Workers' International Association, Local Union No. 19. Case 4–CA–29973

March 3, 2004

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND SCHAUMBER

On December 10, 2001, Administrative Law Judge Paul Bogas issued the attached decision. The Charging Party filed exceptions and a supporting brief. The Respondent filed answers to the Charging Party's exceptions and a brief in support of the judge's decision.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order.

We agree with the judge's dismissal of the complaint in its entirety including, for reasons more fully discussed below, the allegations arising from statements by the Respondent's superintendent, Matthew Negrotti, on July 13, 2000,[2] and from the Respondent's decisions not to hire organizers Patrick Keenan and Robert DiOrio.[3]

I. NEGROTTI'S JULY 13 STATEMENTS

The Respondent fabricates, installs, and services heating, ventilation, and air conditioning (HVAC) systems. On July 13, Keenan and six other union organizers—some wearing union hats—came to the Respondent's office to apply for advertised positions. The Respondent's office manager, Diane Sulzbach, or another office worker, told them that the Respondent required applicants to set up an appointment by telephone before coming in. When the organizers again asked to fill out applications, the Respondent's superintendent, Matthew Negrotti, responded, "Why would you want to? We're an open shop . . . I can see by the gentleman's hat, he's a union worker." The Respondent's project manager, Carl Polichetti, who was also present, repeated that the organizers would have to telephone first, but the organizers refused to leave. The Respondent's president, James Smith, also explained the "telephone first" policy and threatened to call the police if the organizers persisted. Because of the tense atmosphere and the organizers' refusal to depart, Smith had Sulzbach call the police. The organizers departed.

The judge declined to decide whether the version of Negrotti's statements that he credited—"Why would you want to [apply for work]; we're an open shop . . . I can see by the gentleman's hat, he's a union worker."—was unlawful because those statements were not alleged as unlawful in the complaint or in the General Counsel's brief, and their meaning was not fully litigated.[4] In its brief in support of exceptions, the Charging Party argues, inter alia, that the judge should have found that the statements violated Section 8(a)(1). We find it unnecessary to decide whether Negrotti's statements, as credited, were closely related to the complaint allegations and fully litigated, because we conclude that, in any case, those statements were lawful.

We agree with the judge that Negrotti's statements conveyed surprise that the organizers wanted to work for the Respondent, and we find that they are not coercive. See, e.g., *Colden Hills, Inc.*, 337 NLRB 560 (2002). Thus, Negrotti made the statements while the Respondent's office staff was explaining the correct application procedure to the organizers, not discouraging them from applying. Cf. *J.L. Phillips Enterprises*, 310 NLRB 11, 13 (1993). And, to the extent the tone of the conversation became hostile, that hostility was prompted by the organizer applicants' crowding into the Respondent's offices and refusing to abide by the Respondent's application process. Under these circumstances, we find that

[1] The Charging Party has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all of the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] Unless otherwise indicated, all dates are 2000.

[3] In agreeing with her colleagues that the judge correctly dismissed the 8(a)(1) allegation arising from the Respondent's calling the police to evict union organizers on July 13, Member Liebman adopts the judge's analysis only insofar as it is based upon the disruptive behavior of the organizer applicants, see *Heiliger Electric Corp.*, 325 NLRB 966, 967–968 (1998), and not insofar as it relies on their intentions.

In addition, Member Liebman would not rely on *Yellow Freight Systems*, 313 NLRB 309, 329–332 (1993), cited by the judge. That case is cited for the administrative law judge's dismissal of an allegation that the employer unlawfully evicted a union representative from its premises. Because the Board's decision did not mention the issue and the General Counsel apparently filed no exceptions, it is not clear that the finding was reviewed by the Board and thus that the judge's ruling is actually precedential.

[4] The complaint alleges that "[o]n or about July 13, 2000, Respondent by Matthew Negrotti . . . told employee-applicants that Respondent did not want "union guys" at the Facility, thereby indicating that it was futile for [them] to apply" and that "[b]y the conduct described above . . . Respondent has been . . . in violation of Section 8(a)(1) of the Act." The judge discredited the union organizers' testimony that Negrotti stated that the Respondent did not want "union guys."

Negrotti's statements would not have reasonably tended to coerce or interfere with the organizer applicants' exercise of their Section 7 rights.

We respectfully disagree with the view that Negrotti's question was "rhetorical" and that this establishes its unlawfulness. Even if the question ("why would you want to [apply for work]") was indeed a rhetorical one, we do not believe that this would establish a violation. The rhetorical question was simply reflective of Negrotti's surprise that union members were applying for work at a nonunion shop. Neither the question nor the rest of the statement suggested that the Respondent would not hire union members because of their union affiliation.

Our colleague errs in her effort to analogize this situation to a hypothetical one involving a woman who applied for work. In her hypothetical, the shop is "all male," i.e., women will not be hired. In the instant case, an open shop is simply one in which there is no bargaining representative. Obviously, members and nonmembers alike can work in a nonunion shop. There is no evidence that the Respondent would not permit members to work in its nonunion shop.

Further, even if Negrotti's comments were ambiguous, there would not be a violation. Negrotti followed his statement up with a strenuous denial that it was meant to indicate that the organizers would not be hired because of their union status.[5] Our colleague nonetheless asserts that Negrotti's aggressive manner undercuts his denial. We disagree. Rather, we find that the emphatic manner of Negrotti's denial more reasonably would be viewed as strengthening it.

Nor do we agree with the dissent that the failure of the president or project manner to clarify any ambiguity in Negrotti's initial statement supports a violation. To the contrary, the significant point is that Negrotti—who uttered the statement—issued an emphatic denial and neither manager contradicted it.

For all of these reasons, we conclude that the statements did not violate Section 8(a)(1).[6]

II. THE RESPONDENT'S HIRING DECISION

Two months after the organizers' initial visit to the Respondent's office, Keenan and another union organizer, Robert DiOrio, called and scheduled interviews for September 15. They completed applications and were interviewed by Polichetti—Keenan at length and DiOrio until he ended the interview peremptorily—but were not subsequently contacted. Polichetti discussed the organizers' applications with Smith after the interviews, and Smith compared their applications with that of Matthew Cahill, whom Smith interviewed 1 month later and ultimately hired for the position. Smith testified that he hired Cahill for the position of fabricator and commercial installer because he was a certified welder, had more current HVAC installation experience, and, in Smith's view, had better overall qualifications for the job.

We agree with the judge that there is no evidence that the Respondent harbored antiunion animus or was motivated by animus in its treatment of applicants Keenan and DiOrio.[7] We also agree with his finding that the Respondent did not exclude Keenan and DiOrio from its hiring process, and, thus did not unlawfully refuse to consider them.[8]

---

[5] Specifically, Negrotti testified that he yelled out ". . . That's not what I said . . . [and] if you're telling me that that's what I said, I'm calling you a liar."

[6] Unlike the majority and the judge, Member Liebman would find that the statements made by Negrotti would reasonably tend to interfere with the organizer applicants' exercise of their Sec. 7 rights. Negrotti did not testify that he was merely expressing surprise, and the Respondent's own witness, Polichetti, testified that Negrotti's statements were "rhetorical." Unlike an innocent inquiry made in the course of a genuine dialogue, as in *Colden Hills, Inc.*, supra, 337 NLRB at 560, 562–563, a rhetorical question is not posed in expectation of a response but rather for effect. Although the statements here arguably may have been ambiguous—signifying either the Respondent's unwillingness to hire union organizers or, as the majority suggests, the Respondent's doubt that the organizers could have a genuine interest in working for a nonunion employer—the rhetorical effect would reasonably have been to suggest that, in the Respondent's view, the organizer applicants are not suited to work at the Respondent's "open shop" facility because of their union status. (Suppose, for example, a woman applied for the job and was told "Why would you want to apply? We're an all male shop.")

Although during the incident Negrotti strenuously denied that his comments indicated that the organizers would not be hired because of their union status, his aggressive manner undercuts the denial. Moreover, neither the Respondent's president nor the project manager joined in Negrotti's denial, although both were present during the confrontation.

[7] Specifically, the judge found that Negrotti's July 13 statements were not evidence of animus and, in any event, could not have motivated the hiring decision because he had no part in it. In addition, the judge declined to infer unlawful motive from Polichetti's interviews with the organizers, which the judge found were genuine, or from the Respondent's multiple reasons for its hiring decision, which the judge found were not inconsistent or demonstrably false and were supported by the record. The judge also found that the Respondent's 1-month delay in filling the position, in the absence of evidence that such a delay was unusual in the Respondent's operations, did not support an inference of animus.

Although Member Liebman generally agrees with the judge's findings, she disagrees with the implication that the absence of evidence that Negrotti participated in the hiring decision is fatal to an inference of unlawful motivation based on his antiunion statements. See *GM Electrics*, 323 NLRB 125, 125–126, 128 (1997); but cf. *Brown & Root Industrial Services*, 337 NLRB 619 (2002).

[8] In agreeing with the judge and her colleagues' dismissal of this allegation, Member Liebman does not rely on the finding that there is no evidence of antiunion animus, but only on the judge's finding that the organizer applicants were not excluded from the hiring process. *FES*, 331 NLRB 9, 15 (2000), supplemental decision 333 NLRB 66 (2001), enfd. 301 F.3d 83 (3d Cir. 2002).

With respect to the refusal to hire allegations, we find that, even assuming that the Respondent was unlawfully motivated, the evidence as found by the judge establishes, although he did not specifically so find, that the Respondent met its burden to prove that it would have hired Cahill instead of the organizers based on qualifications alone. *FES*, 331 NLRB 9, 12 (2000), supplemental decision 333 NLRB 66 (2001), enfd. 301 F.3d 83 (3d Cir. 2002). We find the Charging Party's arguments to the contrary to be without merit.[9]

Smith, who interviewed Cahill and made the hiring decision, testified that he chose Cahill because of his piping and wiring experience, because he had more recent overall HVAC experience, and because he was a certified welder. In exceptions, the Charging Party asserts that, even assuming that the Respondent was in fact looking for a certified welder, it failed to show that Cahill's welding skills were superior to Keenan's and DiOrio's. But, Smith specifically testified that he needed a *certified* welder for an upcoming project. Cahill clearly had that certification, which the Respondent believed that Keenan and DiOrio lacked. According to Smith's uncontroverted testimony, the Respondent was in imminent need of a certified welder.[10] In addition, the Charging Party argues that Keenan and DiOrio were more well-rounded HVAC mechanics than Cahill in part because of the length of time they had worked in the field. But Smith, who interviewed Cahill himself, testified that he selected Cahill particularly for his piping and wiring skills. When Polichetti asked Keenan and DiOrio during their interviews whether they had refrigeration piping skills, they stated that they did not, and Keenan indicated when asked that he did not have high voltage wiring skills. Although Keenan testified that he had substantial experience, including as a foreman, working in the HVAC field for employers who did all aspects of that work, he did not specifically testify that he had, or told Polichetti during his interview that he had, piping and wiring experience.[11] Finally, it is undisputed that Keenan had not done full-time HVAC work for at least 8 years.[12] Under these circumstances, we find that the Respondent hired Cahill rather than the organizer applicants based on his qualifications and would have made the same decision even in the absence of the organizers' protected activity.

ORDER

The complaint is dismissed.

Dated, Washington, D.C. March 3, 2004

Robert J. Battista, Chairman

Wilma B. Liebman, Member

Peter C. Schaumber, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

Richard Wainstein, Esq. and *Amy L. Weiss, Esq.*, for the General Counsel.

Michael J. Wietrzychowski, Esq. (*Cureton Caplan Hunt Scaramella & Clark, P.C.*), of Delran, New Jersey, for the Respondent.

Bruce E. Endy, Esq. (*Spear, Wilderman, Borash, Endy Sper & Runckel*), of Philadelphia, Pennsylvania, for the Charging Party.

DECISION

STATEMENT OF THE CASE

PAUL BOGAS, Administrative Law Judge. This case was tried in Philadelphia, Pennsylvania, on July 12, 2001. The Sheet Metal Workers' International Association, Local Union No. 19 (the Union or Local 19) filed the original charge on November 28, 2000, and the amended charge on January 4, 2001. The Regional Director for Region 4 of the National Labor Relations Board issued the complaint on February 28, 2001. The complaint alleges that JS Mechanical, Inc. (the Respondent) violated Section 8(a)(1) and (3) of the Act, by refusing to hire and consider for hire Patrick Keenan and Robert DiOrio because they are members of the Union. The complaint also alleges that the Respondent violated Section 8(a)(1) of the Act by telling union applicants that it did not want "union guys" at the facility

[9] Member Schaumber would not reach the question whether the Respondent has shown that it would have made the same hiring decision absent the organizers' protected activity. In dismissing the refusal-to-hire allegation, he relies solely on the judge's finding that the General Counsel failed to establish antiunion animus.

[10] DiOrio was not asked at the hearing whether he possessed a welding certification at the time of his interview, and Polichetti did not indicate that he asked DiOrio during the interview. However, Smith's testimony indicates that he chose Cahill over DiOrio because Cahill was certified, and the General Counsel, while asserting that DiOrio was at least as qualified in welding as Cahill, does not argue that he was a certified welder. Although Keenan testified that he informed Polichetti at his interview that he could quickly be recertified as a welder, the judge credited Smith's testimony that Polichetti did not tell him this and that Smith believed that recertification would take 1 year.

[11] Neither Keenan's nor DiOrio's application is in evidence; moreover, Keenan's resume does not indicate the particular types of work he performed for past employers. According to Polichetti, Keenan stated when asked that he did have some gas piping experience, but had not done that work in several years and might need retraining.

[12] Keenan testified that he had been doing part-time HVAC work during his 8 years as an organizer, but there is no indication that he told Polichetti this, and it is not apparent from his resume.

and by threatening to call the police if the union applicants did not leave the facility. The Respondent filed an answer and amended answer, in which it denied the substantive allegations of the complaint.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the parties, I make the following findings of fact and conclusions of law.

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a corporation, is a heating and air conditioning contractor with an office and principal place of business in Ivyland, Pennsylvania. During the year prior to the issuance of the complaint, the Respondent purchased goods valued in excess of $50,000 directly from points outside the Commonwealth of Pennsylvania in the course of its business.

The Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background

The Respondent is a contractor that fabricates, installs, and services heating, ventilation, and air conditioning (HVAC) systems. It has a facility in Ivyland, Pennsylvania, that includes an office and sheet metal fabrication shop. James Smith has been the Respondent's president and owner since 1990. At the time of the alleged violations, the Respondent employed 15 to 16 persons to do HVAC work. The Respondent has never been a signatory to a collective-bargaining agreement with a union, and its work force has never been represented by a union.

The incident on July 13, 2000

For a 2-week period beginning on July 11, 2000, two help-wanted advertisements submitted by the Respondent appeared in a local newspaper. One read:

> HVAC Service Tech
> Excellent Wages & Benefits
> Call 8–4:30 Daily
> [Respondent's Telephone Number]

The other read :

> HVAC Commercial Construction Foreperson
> Excellent Wages & Benefits
> 8–4:30 Daily [Respondent's Telephone Number]

On the afternoon of July 13, 2000, seven union officials arrived together at the Respondent's facility after seeing or hearing about the help-wanted advertisements. Although the advertisements did not reveal the name or address of the Respondent, these individuals discerned that the Respondent had placed the advertisements and found their way to the Respondent's facility. None of the individuals called the telephone number listed in the advertisement to schedule an appointment prior to appearing at the facility on July 13. The seven union officials were: Patrick Keenan (P. Keenan) and Charles Burkert, organizers with Local 19; Fred Hammel and Bill Reese, organizers with the roofers' union; Steven Keenan (S. Keenan), an organizer with the plumbers' union; Fred Cosenza, a representative of the Philadelphia building trades; and Jimmy Cunningham, an organizer with the insulators union. Burkert was wearing a hat on which appeared the statement "Sheet Metal Workers Local 19." Prior to arriving at the Respondent's facility, the same group had visited two roofing companies to apply for jobs that were unrelated to HVAC systems.

P. Keenan led the group of applicants into a small waiting area adjacent to the Respondent's office, halting near the entrance to the office itself. He told [the] staff of the Respondent that he and the others wished to complete applications for the jobs advertised in the newspaper. One of the women working in the office informed P. Keenan that the Respondent accepted applications only from persons who had first telephoned to schedule an appointment and that he and the other organizers/applicants would have to call to schedule appointments before they would be allowed to complete applications. Matt Negrotti Jr., a superintendent with the Respondent, was also present in the office when the organizers/applicants arrived and one of those individuals told Negrotti that they wanted to fill out applications. Negrotti responded, "Why would you want to; we're an open shop." An applicant asked Negrotti what he meant by that, and Negrotti pointed to Burkert's union hat and said, "I can see by the gentleman's hat, he's a union worker." Also present was Carl Polichetti, a project manager for the Respondent. Polichetti explained to the applicants that they would have to call for an appointment if they wished to complete applications.

Either Negrotti or Polichetti informed Smith that a "bunch of guys" were in the "vestibule" asking for employment applications. Smith approached the organizers/applicants and told them that they would have to call for interviews. The organizers/applicants insisted that they be permitted to complete applications. Smith explained that the Respondent's policy was to accept applications only from persons who had first telephoned to schedule an appointment, and that the organizers/applicants would have to call for interviews if they wanted to submit applications.[1] Although the organizers/applicants had now been informed by three people that they would have to call to schedule appointments if they wanted to complete applications, the organizers/applicants continued to ask for applications and declined to exit. Diane Sulzbach, an officer manager who was present, testified that the organizers/applicants gave the impres-

[1] I accept the Respondent's contention that its policy was to accept employment applications only from individuals who had telephoned to schedule appointments. This finding is consistent not only with the testimony of the Respondent's officials, but also with the text of the help-wanted advertisements, which state the telephone number, but not the address, of the Respondent. The General Counsel introduced no evidence indicating that the Respondent allowed nonunion applicants to complete applications without first calling to schedule appointments. Moreover, the record shows that the Respondent interviewed individuals known to be affiliated with unions when those individuals followed the Respondent's procedure by telephoning first to set up appointments.

sion that they would not leave "until they got what they came for," that matters became tense, and that she was "freaked out" and "scared." One of the organizer/applicants, Burkert, admitted that he became angry and that he raised his voice to the Respondent's officials. When the organizers/applicants declined to depart, Smith said, "Listen, if you don't leave, I'm going to have to call the Police." At least some of the organizers/applicants still declined to exit the premises, and Smith directed Sulzbach to call the police, which she did. The organizers/applicants apparently left the building at about this time. The encounter lasted 10 minutes or less.

Soon after exiting, Patrick Keenan attempted to call the Respondent from outside the office to schedule an appointment, but the phone line was busy. During the period immediately after the organizers/applicants exited the Respondent's office and waiting area, the Respondent received calls from a number of individuals who scheduled appointments to apply for work, but these individuals did not appear for their scheduled appointments and the record does not reveal if any of these calls were placed by the organizers/applicants.

The complaint includes an allegation that Smith and/or Negrotti told the organizers/applicants that the Respondent did not want "union guys" at the facility. I conclude that the General Counsel has failed to prove that this statement was made. The allegation regarding the "union guys" comment was denied by Smith, (Tr. 154), Negrotti (Tr. 115), and Polichetti, (Tr. 124–25).[2] The General Counsel's witnesses on this subject—P. Keenan, Burkert, and S. Keenan—gave testimony that was quite inconsistent. According to P. Keenan, Negrotti said, "We don't want no union guys around here." (Tr. 22). Burkert, on the other hand, testified to the quite different statement: "We're non-Union and we don't hire Union. We don't even have an ad in the paper." (Tr. 75). The only real similarity between P. Keenan's and Burkert's reports of the offending statements is that both explicitly refer to unions in a way that indicates persons associated with unions are not welcome. Moreover, Burkert was unable to specifically identify who made the alleged remark. S. Keenan, who is P. Keenan's brother, was also unable to identify a specific speaker, but testified that a man in the Respondent's office said "we don't want you guys around here," and then explained, "You know what you union guys are." (Tr. 67). This testimony is at variance with Burkert's account and only somewhat consistent with P. Keenan's version of what was said. Based on the inconsistencies in the testimony of the General Counsel's witnesses, as well as the demeanor of those witnesses, and also considering the demeanor and contrary testimony of the Respondent's witnesses, I decline to credit the testimony of the General Counsel's witnesses regarding the alleged unlawful statement. I find that the General Counsel has not met its burden of showing that an official of the Respondent more likely than not made the statement.

[2] Sulzbach was present for some of the July 13 episode, but testified that she was very upset during the incident, and could not remember any of the specific statements during the exchange.

The failure to hire P. Keenan and DiOrio after interviews on September 15, 2000

For a 2-week period beginning on September 13, 2000, two help-wanted advertisements submitted by the Respondent appeared in local newspapers. One read:

> HVAC Commercial
> Installation Mechanic
> Exc. Wages & Benefits
> Call JS Mechanical @ [Telephone Number]
> for interview

The other read:

> HVAC Service Technician
> Commercial & Residential
> Exc. Wages & Benefits
> Call JS Mechanical @ [Telephone Number]
> for interview

P. Keenan telephoned the Respondent and scheduled an interview for September 15, 2000. Robert DiOrio, another organizer with the Union, also telephoned the Respondent, and he, too, scheduled an interview for September 15. On September 15, P. Keenan and DiOrio arrived together at the Respondent's facility for their appointments. Originally Smith was going to interview P. Keenan and DiOrio himself. However, for reasons that are not entirely clear, he became unavailable to conduct the interviews and directed Polichetti to do so. In the past, Polichetti had sometimes interviewed applicants, but generally his involvement in hiring was minimal, and Smith had ultimate hiring authority.

After arriving at the Respondent's facility, P. Keenan completed an application, which he supplemented with a resume. The resume indicated that P. Keenan had been an organizer with the Union from 1992 to the present.[3] It did not report work experience for P. Keenan as anything other than an organizer after 1992. The resume listed experience with two private employers from 1981 to 1992, but did not state what P. Keenan's positions or job duties were with those companies. The resume reported, inter alia, that P. Keenan had attended a 4-year journeyman program, a 4-year apprenticeship program, and a 2-year program at the Union's welding school, but did not state when he had attended or completed those programs. It noted that P. Keenan had "[e]xperience with layout, fabrication, sketching and installation of sheet metal work" "use of brake, form machines and plasma." The resume does not mention HVAC systems, or explicitly state that any of P. Keenan's work or training involved such systems. On his application, P. Keenan listed his experience and training as a sheet metal worker.[4]

[3] The applications of P. Keenan and DiOrio were not produced at trial; however, the resume that P. Keenan gave to the Respondent was made an exhibit.

[4] P. Keenan testified that the apprenticeship program included training in HVAC installation, and that his prior work experience included installation of HVAC systems. However, he did not testify that he conveyed this information on his application. At any rate, P. Keenan testified that he completed the apprenticeship program in 1985 and that he he had not received any additional training between then and the

P. Keenan's interview with Polichetti lasted 20–25 minutes. Polichetti looked over P. Keenan's application and resume and commented, "I see you're very qualified." Polichetti went on to make a fairly detailed inquiry into P. Keenan's experience and capabilities. P. Keenan described work in single-family dwellings, residential units, commercial settings, hospitals, industrial settings, and high rise office buildings. P. Keenan responded in the affirmative when Polichetti asked if he could solder and braze. Polichetti also asked about various skills relevant to HVAC installation and P. Keenan conceded that he lacked a number of these skills. In particular, Polichetti asked P. Keenan if he could do high voltage wiring, refrigeration, evacuation, checking, testing, and charging, and P. Keenan responded that he was not capable of those tasks. Polichetti asked if P. Keenan could do gas piping, and thread couple piping, and P. Keenan indicated that he would require retraining in those areas. Polichetti asked if P. Keenan could do work involving digital controls, and P. Keenan answered that he did not have much experience in that area. When asked whether he was a certified welder, P. Keenan responded that he was no longer certified, but that he had been certified in the past and could become recertified quickly. P. Keenan conceded that welding is a common practice in the HVAC field and is very important to that work. Before the interview ended, P. Keenan offered to enter the Respondent's shop area and show what types of machinery he could operate, but Polichetti declined the offer.

Polichetti interviewed DiOrio after P. Keenan's interview concluded. At the time of the interview, DiOrio had been a union organizer for a month or two, and prior to that he had been a sheet metal worker for 18 years. On his application, DiOrio stated that he was applying for the positions of fabricator, installer, and helper. He listed experience running a shop where ductwork was fabricated, operating various machines, and sketching. He reported that he had been to a welding school, but the record does not reveal whether he stated that he was, or ever had been, certified as a welder. During the interview, Polichetti asked DiOrio about his service experience, and DiOrio responded that he had attended a class on service work for a year, but had no experience actually doing service work in the field. According to DiOrio, service work includes such tasks as installing the unit, wiring the unit, running gas pipe, running the line set from the condenser to the heater, and trouble shooting the unit.[5] Polichetti asked if DiOrio could perform piping or refrigeration work, and DiOrio responded that he could not, but that he could easily do the sheet metal component of the work. After about 10 minutes, DiOrio interrupted Polichetti's questioning and said: "Look, you really know what I'm here for. You know, please give this information to Mister Smith on how we can help him with his manpower problems." The two men got up, shook hands, and DiOrio left.

Polichetti gave the applications of both P. Keenan and DiOrio to Smith. Later Smith and Polichetti briefly discussed the applications and what Polichetti had gleaned during the interviews. Polichetti testified that P. Keenan and DiOrio "didn't seem like they had the qualifications that virtually all of our other mechanics have," and "[w]e couldn't understand how we could . . . work with these guys." The Respondent never contacted P. Keenan and DiOrio to inform them whether they had been selected for employment. P. Keenan telephoned the Respondent a week after his interview to check on the status of his application and was told that Smith or Polichetti would call him, but neither did.

Smith selected Matthew Cahill on October 15, 2000, to fill the opening for which P. Keenan and DiOrio had been interviewed.[6] Cahill was interviewed by Smith on October 12, 2000. Cahill reported that his most recent employment was in a position he listed as "HVAC," from March of 1998 until September of 2000. He stated that his duties included "fabrication of duct & installation," and Mig welding. He reported working prior to that from January of 1997 until March of 1998 as an "HVAC-Welder," in which capacity his duties included "fabrication of duct & installation," and Mig, Tig, and stick welding. The resume states that Cahill had graduated from a welding program in 1983 and was a certified welder. Smith said that during the interview he asked Cahill questions to determine how "well-rounded" he was. Smith determined that Cahill's HVAC experience included "wiring," but that Cahill lacked boiler experience and service experience. Although Cahill was a member of the Union, the Respondent was not aware of this at the time it interviewed and selected him.

Smith testified that he compared Cahill's application to those of P. Keenan and DiOrio, and decided to select Cahill. According to Smith, Cahill was hired primarily because he was a certified welder with both pipe welding and duct welding experience and that the Respondent had an upcoming job that required a certified welder to perform the pipe welding in apartments at an airforce base. Smith was aware that P. Keenan had once been certified as welder, but knew that this certification had expired. According to Smith, there was generally a 1-year waiting list to obtain recertification. He was unaware that P. Keenan had told Polichetti that he could be recertified quickly. Smith also stated that in his view Cahill had broader relevant experience than P. Keenan and DiOrio, including experience in wiring.[7] He noted that Cahill's work experience in the HVAC field was very current.[8]

time he applied in September of 2000. P. Keenan testified that the contractors he worked for from 1981 to 1992 installed HVAC systems, but he did not state which of the various installation tasks he himself performed while working for those contractors, nor did he state what precisely he told the Respondent about that work.

[5] This differs from sheet metal fabrication work for HVAC systems, which usually takes place in a shop and involves making ducts out of flat pieces of metal.

[6] The General Counsel concedes that it appears there was only one opening available in the position for which P. Keenan and DiOrio applied. GC's Br. at fn. 10.

[7] The General Counsel argues that Cahill's application did not indicate piping or wiring experience, GC's Br. at 32–33, that Cahill's application did not claim experience with installation or wiring, Id. at 30, and that I should reject Smith's contention that Cahill's piping and wiring experience were among the reasons that he was selected instead of P. Keenan and DiOrio. However, the fact that Cahill did not list installation and wiring experience on his application does not prove that Smith was unaware that Cahill had such experience. Cahill (who no

B. The Complaint Allegations

The complaint in this case alleges that the Respondent violated Section 8(a)(1) of the Act by telling organizers/applicants that it did not want "union guys" at the facility, thereby indicating that it was futile for the organizers/applicants to apply for employment. In addition, the complaint alleges that the Respondent violated Section 8(a)(1) by threatening to call the police if the organizers/applicants did not leave the facility. The complaint further alleges that the Respondent violated Section 8(a)(1) and (3) of the Act by refusing to hire and consider for hire P. Keenan and DiOrio because they are members of the Union.

III. ANALYSIS AND DISCUSSION

A. Antiunion Remark

It is a violation of Section 8(a)(1) for an employer to make statements to applicants indicating that it would be futile for union members to apply for employment. *Sunland Construction*, 311 NLRB 685, 704 (1993); *J. L. Phillips Enterprises*, 310 NLRB 11, 13 (1993). The complaint alleges that when the organizers/applicants appeared at the Respondent's facility on July 13, Negrotti or Smith said that the Respondent "did not want 'union guys' at the Facility, thereby indicating that it would be futile for employee-applicants with Union affiliation to apply." Negrotti and Smith were both supervisors and agents of the Respondent at the time and the General Counsel alleges that the statement violates Section 8(a)(1).

Preliminarily, the Respondent contends that "[g]iven the makeup of the group [of organizers/applicants] that arrived en masse and unannounced at the Respondent's place of business, it is clear that the they had no real intention of seriously applying." (Respondent's proposed findings of fact at p. 6, par. 17). Although the Respondent does not explicitly make the argument, it appears to be suggesting that the organizers/applicants were not "employees" entitled to the Act's protection since they were not bona fide applicants. I conclude that the organizers/applicants, although they were paid union organizers, were bona fide applicants at the time the Respondent allegedly indicated that it would be futile for them to apply. Professional organizers, when applying for work, are considered statutory employees entitled to the protections of the Act. *NLRB v. Town & Country Electric*, 516 U.S. 85 (1995). Several of the organizers/applicants testified credibly that their activities as organizers included attempting to get hired by nonunion companies with the intention of trying to organize the company's work force once hired. Although the organizers/applicants did adopt a rather intimidating posture during their July 13 visit to the Respondent's facility, I find that one of their objectives at the time of Negrotti's alleged unlawful statements was to secure employment with the Respondent. Therefore, I conclude that the organizers/applicants must be considered employees entitled to the protections of the Act at that time.

As discussed above, I have found that the General Counsel failed to meet its burden of showing that, as alleged in the complaint, Negrotti or Smith told the organizers/applicants that the Respondent did not want "union guys," or made any other remarks to them explicitly stating that union applicants were not welcome. I did find, however, that when the organizers/applicants stated that they wanted to fill out applications, Negrotti responded, "Why would you want to; we're an open shop" and that when asked what he meant, Negrotti replied, "I can see by the gentleman's hat, he's a union worker." The complaint does not mention these statements by Negrotti and in its brief, the General Counsel does not allege that these statements violated Section 8(a)(1). However, the General Counsel's brief does remark in passing that the statements "suggested that the applicants were wasting their time." The meaning and legal import of the statements that I find Negrotti made were not fully litigated and I believe it would be inappropriate for me to go beyond the allegations of the complaint and rule on whether those statements violated the Act. It is certainly not clear to me based on the evidence that was presented that Negrotti was doing anything more than expressing surprise that union workers wanted to apply with the Respondent. Negrotti did not, at least on the face of it, indicate that union members were disqualified as applicants, or that it would be improper for persons affiliated with unions to work for the Respondent.

I conclude that the complaint allegation that the Respondent violated Section 8(a)(1) by stating that it "did not want 'Union guys' at the Facility, thereby indicating that it was futile for employee-applicants with Union affiliation to apply for employment" should be dismissed.

B. Respondent's Threat to Call the Police

The General Counsel alleges that the Respondent violated Section 8(a)(1) on July 13 by threatening to call the police if the organizers/applicants did not leave the facility. The Respondent's president and owner, Smith, admits he told the organizers/applicants that if they would not leave, he would call the police, but the Respondent contends that such action was not unlawful because of the belligerent and intimidating behavior of the organizers/applicants.

The General Counsel states that an employer violates Section 8(a)(1) when it threatens to call the police if union representatives who are acting lawfully on the employer's property refuse to leave. At the time Smith threatened to call the police, however, the organizers/applicants no longer had a legitimate purpose for being inside the Respondents' facility. The organizers/applicants who testified about the July 13 episode did not deny that they refused to withdraw from the facility even after being repeatedly told that if they wished to apply they, like other prospective applicants, would have to first schedule appointments by telephone. Moreover, I am convinced that the

---

longer works for the Respondent and is a member of the Union) was not called as a witness by General Counsel, and there is no record evidence rebutting Smith's testimony that he interviewed Cahill and understood that Cahill had experience in piping and wiring.

[8] Cahill is a member of the Union, but at the time the Respondent hired him it was unaware of this affiliation. On September 10, 2000, the Respondent hired James Ward as a fabricator, despite the fact that Ward had stated on his application that he was a union sheet metal apprentice. Anthony Visalli, a foreman with the Respondent, testified that the Respondent hired him even though he volunteered during an interview with Polichetti that he was, or had been, affiliated with the pipefitters' union.

Respondent's inhospitality attempts to apply on a walk-in basis did not come as a surprise to the organizers/applicants since the help-wanted advertisements to which the organizers/applicants were responding withheld the Respondent's identity and location. Under all the circumstances, I believe that the organizers/applicants were no longer attempting in good faith to initiate the Respondent's application process at the time Smith threatened to call the police.

What precisely the organizers/applicants did hope to accomplish by refusing to leave after being apprised of the Respondent's policy regarding applications is not perfectly clear, although it is certainly plausible given the evidence that their aim was to intimidate the Respondent.[9] One thing that is clear is that their activities were having the effect of disrupting work in the Respondent's office. At least four persons employed by the Respondent, including the president of the company, were drawn into the exchange, and one office worker testified credibly that she was "freaked out" by the organizers/applicants and left the area. Burkert, an organizer/applicant, admitted that he became angry and raised his voice to an employee of the Respondent during the incident. The Board has upheld the right of employers to set rules controlling the access of union applicants to their workplace where the presence of those applicants was disruptive of the work of the employer's office staff. *Rainbow Painting & Decorating*, 330 NLRB 972, 2000 WL 345405, *39 (NLRB). With respect to union organizers, the Board has also upheld a decision that it was permissible for an employer to have the police evict a union organizer from its premises when the organizer was disrupting work. *Yellow Freight Systems*, 313 NLRB 309, 329–332 (1993), enf. granted in part denied in part by 37 F.3d 128 (3d Cir. 1994). When Smith warned that he would call the police, the organizers/applicants no longer had a legitimate purpose for remaining inside the Respondent's facility and were disrupting work in the Respondent's office.

The General Counsel cites *Farm Fresh, Inc.*, 305 NLRB 887 (1991), and *Weis Markets, Inc.*, 325 NLRB 871 (1998), to support its contention that Smith committed a violation when he warned that he would call the police unless the organizers/applicants left the facility. However, neither of those decisions supports finding a violation where, as here, the organizer was not engaged in legitimate organizational activities at the time an employer threatened to call the police. Indeed, the decision in *Farm Fresh* upheld the right of the employer to threaten to have the police eject an organizer suspected of unprotected "blitz" tactics such as scattering union literature in a nonpublic location in the facility. 305 NLRB at 888. In *Weis Markets*, the employer threatened to have nonemployee organizers arrested unless they stopped leafleting on the sidewalks in front of three of the Respondent's stores. In a decision affirmed by the Board, the administrative law judge concluded that the employer had violated the Act by excluding the organizers, but based this conclusion on the fact that the employer's leases did not give it the right to control access to the sidewalks in front of the stores. In the instant case, the organizers were actually inside the Respondent's facility, in a waiting area barely large enough to contain them. The General Counsel has not suggested that the Respondent's property interests in that area did not include the right to exclude persons from it. Moreover, whereas in *Weis* it appears that the organizers were engaging in leafleting activity protected by Section 7, the organizers in the instant case had no legitimate purpose inside the Respondent's facility at the time Smith warned that he would call the police. Thus, *Weis* does not warrant finding a violation in the instant case.

For the reasons discussed above, I conclude that the allegation that the Respondent violated Section 8(a)(1) on July 13 by threatening to call the police if the organizers/applicants did not leave the facility should be dismissed.

C. Refusal to Consider or Hire

In order to establish discriminatory refusal to hire in violation of the Act, the General Counsel must first show: "(1) that the respondent was hiring, or had concrete plans to hire, at the time of the alleged unlawful conduct; (2) that the applicants had experience or training relevant to the announced or generally known requirements of the positions for hire, or in the alternative, that the employer has not adhered uniformly to such requirements or that the requirements were themselves pretextual or were applied as a pretext for discrimination; and (3) that antiunion animus contributed to the decision not to hire the applicants." *FES*, 331 NLRB 9, 12 (2000). If the General Counsel succeeds in making these showings, the burden shifts to the respondent to show that it would not have hired the applicants even in the absence of their union activity or affiliation. Id. To establish discriminatory refusal to consider, the General Counsel bears the burden of showing: (1) that the respondent excluded applicants from a hiring process; and (2) that antiunion animus contributed to the decision not to consider the applicants for employment. *FES*, 331 NLRB 9, 15.

The record establishes the first two elements of a refusal-to-hire claim. The evidence shows that the Respondent was seeking to fill an opening in September and October of 2000 when P. Keenan and DiOrio applied and were denied employment. Furthermore, it is clear that P. Keenan and DiOrio had experience and training in the sheet metal and HVAC fields that was relevant to significant aspects of the HVAC mechanic/installer position that Respondent was seeking to fill. The General Counsel stumbles, however, at the requirement that it show the existence of antiunion animus that contributed to the decision not to hire the applicants. In an effort to meet its burden with

[9] As discussed above, I do conclude that earlier in their visit the organizers' purposes included a legitimate attempt to seek employment. However, once the organizers had repeatedly been apprised of the Respondent's policy requiring potential applicants to telephone to schedule an appointment, their refusal to leave the premises was no longer part of a legitimate attempt to apply for work. Even if obtaining employment was still among their purposes at the time of Smith's statement regarding the police, and I doubt that it was, the organizers' tactic of attempting to bully the Respondent into permitting them to bypass the normal application procedures does not justify their refusal to leave the facility. See *W.D.D.W. Commercial Systems & Investments, Inc.*, 2001 WL 1011927, *23 (NLRB) (decision that union organziers are not meaningfully distinguishable from other 'employees' under the statute should not be read to give paid union organizers carte blanche in the workplace; organizers are subject to valid employer rules).

respect to this element, the General Counsel first relies on Negrotti's alleged statement, 3 months earlier, that the Respondent did not want "Union guys" around. However, as discussed above, I found that the General Counsel failed to show that Negrotti made that statement. The statements that Negrotti was shown to have made indicated surprise about the organizers/applicants desire to apply for work with the Respondent, but do not establish antiunion animus. At any rate, there is no evidence that Negrotti was involved in any way with the decision not to select P. Keenan and DiOrio for employment. The alleged discriminatees were interviewed by Polichetti and the hiring decision was made by Smith after a discussion with Polichetti. Thus even if the General Counsel had shown that Negrotti harbored antiunion animus, it still would have failed to show that Negrotti's antiunion feelings contributed to the decision not to hire P. Keenan or DiOrio.

The General Counsel also argues that animus is shown by the fact that Polichetti described the position as "residential installer" during the interviews whereas Smith testified that the position he wanted to fill was "commercial installation mechanic." I do not consider it particularly telling that Polichetti called the position something somewhat different than what Smith called it. Polichetti did not place the help-wanted advertisement and did not make the hiring decision. He was called upon to interview the applicants only when Smith unexpectedly became unavailable. Moreover, there was no evidence that the distinction between residential installer and commercial installer was significant, and, indeed, Polichetti testified that generally anyone who could do commercial installation could also do residential installation. At any rate, Polichetti's basic view that the experience of the two alleged discriminatees was unappealingly narrow from the Respondent's point of view is consistent with Smith's explanation for rejecting them in favor of Cahill, regardless of the precise title of the position.

The General Counsel also argues that antiunion motive can be inferred from the Respondent's "shifting, inconsistent and clearly pretextual" explanations for rejecting the alleged discriminatees. (GC's Br. at 28–29). I disagree. Smith, who made the decision to select Cahill, testified that he did so because Cahill, unlike either Keenan or DiOrio, was a certified welder with both pipe and conduit welding experience, and because Cahill's HVAC experience was broader than theirs and included wiring experience. Most of the experience of the alleged discriminatees, at least their more recent hands-on experience, was in the area of sheet metal fabrication, which involved constructing metal ducts for HVAC units, but did not encompass HVAC-related tasks such as piping, wiring, evacuation, and charging. Smith also stated that he was favorably impressed with the fact that Cahill had very current experience in the HVAC field, in contrast to P. Keenan, whose recent work was as a union organizer. While there is, I grant, some basis for difference of opinion about whether the Respondent selected the best applicant, the reasons given by the Respondent for choosing Cahill instead of P. Keenan and DiOrio are coherent and have support in the record. Certainly those reasons are not so clearly false as to satisfy the General Counsel's burden of showing animus. Indeed, the record did reflect that P. Keenan had worked almost exclusively as an organizer —not as a sheet metal worker, much less an HVAC specialist—for approximately 8 years prior to applying. Similarly, the evidence showed that DiOrio's experience as a sheet metal worker including work involving HVAC units, but that this HVAC work was largely limited to fabricating ducts, and did not include doing service work such as installation, wiring, running gas piping, and trouble shooting. Cahill, on the other hand, worked full-time in the HVAC field from 1997 until September of 2000. Cahill reported that he had experience wiring HVAC units, and that he was a certified welder with both pipe and duct welding experience.

The General Counsel argues that antiunion animus is shown by the fact that Smith has given different reasons for selecting Cahill over P. Keenan and DiOrio. I do not believe that this shows animus, or even pretext, under the facts present here. An employer will frequently have multiple reasons for considering one applicant better suited for a position than another. The fact that the Respondent, or another employer, gives more than one reason for selecting a particular applicant does not, without more, show that any of those reasons are untrue. Here, Smith's reasons—i.e., that Cahill had broader, more recent, HVAC experience and that his status as a certified welder was of value for a large upcoming project—are not inconsistent or incompatible with one another and each may reasonably have played a part in the selection decision.

The General Counsel also attempts to raise an inference of animus by noting that after P. Keenan and DiOrio applied, the Respondent left the position unfilled for a month before hiring Cahill. In my view, a month-long selection process is not so protracted as to raise an inference of antiunion animus. The General Counsel did not produce any evidence that a 1-month selection period was very unusual in the Respondent's operations or that it was contrary to the practices of other employers in the industry.

Finally, it is worth noting that at least three of the seven individuals hired by the Respondent in September and October of 2000 were either current or former union members. In the case of two of those hirees—Anthony Visalli and James Ward —the evidence showed that the Respondent was aware of the union affiliation at the time it made the selections. Although it is still possible that the Respondent would seek to exclude other union members, that evidence does cast further doubt on the General Counsel's allegation of discriminatory hiring.

I also conclude that the General Counsel has failed to meet its burdens with respect to the allegation of discriminatory refusal to consider. First, the evidence does not show that P. Keenan and DiOrio were excluded from the hiring process. The Respondent interviewed P. Keenan at length and in detail regarding his experience and qualifications. The Respondent began a similarly thorough interview with DiOrio, but DiOrio chose to terminate the interview before its completion. After the interviews, Polichetti and Smith discussed the qualifications and experience of the two alleged discriminatees. Smith compared the qualifications of the alleged discriminatees to those of Cahill before deciding to select Cahill. The reasons that Smith gave for his selection are not incoherent, contrary to the record, or otherwise implausible. I conclude that the Re-

spondent did not exclude the discriminatees from the hiring process.

The General Counsel argues that P. Keenan and DiOrio were denied consideration for employment because Smith did not personally interview them and because their references were not contacted. I do not find it significant that the alleged discriminatees were interviewed by Polichetti rather than by Smith. Polichetti sometimes interviewed job applicants and Smith was not available at the time of alleged discriminatees' scheduled interviews. The fact that after P. Keenan and DiOrio were interviewed and compared to the selected applicant, the Respondent chose not to contact their references does not amount to a failure to consider given the record of this case. There was no evidence that the Respondent contacted the references of all, most, or even very many, of the applicants who it considered for hire. The fact that the alleged discriminatees only made it so far in the selection process does not mean that they were *excluded* from that selection process. In any case, had I concluded that the Respondent decided not to fully consider P. Keenan and DiOrio for employment, I would still not find a violation since the General Counsel has not shown that antiunion animus contributed to any such decision. This conclusion is based on the same factors that led me to conclude that the General Counsel has failed to demonstrate that antiunion animus contributed the decision not to hire P. Keenan and DiOrio.

For the reasons discussed above, I conclude that the allegation that the Respondent violated Section 8(a)(1) and (3) by refusing to hire, or consider for hire, P. Keenan and DiOrio should be dismissed.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent has not been shown to have committed the unfair labor practices alleged in the complaint.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended [10]

ORDER

The complaint is dismissed.

Dated, Washington, D.C. December 10, 2001

[10] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.